92-1749

No.

Supreme Court, U.S.
FILED
MAY 3 - 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

THOMAS F. ICARD, JR., as Trustee, and FAYE ICARD HUSKINS, as Trustee-designate,

Petitioners,

v.

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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Attorneys for Petitioners

QUESTIONS PRESENTED

1. Do frequent, regular, low altitude, direct invasions of the super-adjacent airspace over private property by commercial, jet aircraft arriving and departing from a public airport constitute a physical invasion so as to establish a permanent (as distinguished from a temporary) "taking", within the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. If the answer to Question 1 is "yes", does a judicial finding of such a physical invasion of private property presumptively establish a taking *per se*, so as to entitle the claimant to a jury determination of the extent of damages incurred as a result of the taking, if any?

3. If the answer to Question number 2 is "yes", is a state court finding of such a physical invasion of private property accompanied with the determination that a claimant must also prove a reduction in the market value of the property in order to establish a taking as defined above and as a condition precedent to a jury determination of the extent of damages incurred as a result of the taking, if any, contrary to applicable decisions of this Court?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (i)

TABLE OF AUTHORITIES . . . . . (iv)

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING SUMMARY DISPOSITION OF REVERSAL 9

CONCLUSION 13

APPENDICES

A. Opinion and Order of the District Court of Appeal of Florida, Second District (November 20, 1992) 1a

B. Partial Summary Judgment of the Circuit court of the Twelfth Judicial Circuit of Florida (August 23, 1989) 3a

C. Order of The Supreme Court of Florida Denying Petitioners' Notice to Invoke Discretionary Jurisdiction (January 16, 1991) 5a

D. Final Judgment of the Circuit Court of the Twelfth Judicial

Circuit of Florida (July 25, 1991) 6a

E. Order of the District Court of Appeal of Florida, Second District, Denying Appellants' Motion for Rehearing, etc. (January 28, 1993) 8a

F. Order of the Supreme Court of Florida Denying Petitioners' Notice to Invoke Discretionary Jurisdiction (March 15, 1993) 10a

G. Opinion and Order of the District Court of Appeal of Florida, Second District (September 7, 1990) 12a

TABLE OF AUTHORITIES

Cases	Page
Fields v. Sarasota-Manatee Airport Authority, 512 So.2d 961 (Fla. 2d DCA, 1987)	3,4,11,20
Griggs v. County of Allegheny, 369 U.S. 84 (1962)	7,15,20
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	6,16
Lucas v. South Carolina Coastal Council, _____ U.S. ____, 112 S. Ct. 2886 (1992)	16
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)	12
Sarasota-Manatee Airport Authority v. Icard, et al., 567 So.2d 937 (Fla. 2d DCA 1990)	1,2,10
United States v. Causby, 328 U.S. 256 (1946)	7,14,16,20

In The

Supreme Court of the United States

October Term, 1992

No.

THOMAS F. ICARD, JR., as Trustee, and FAYE ICARD HUSKINS, as Trustee-designate,

Petitioners,

v.

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

Pursuant to Rule 16.1 of this Court, petitioners here seek a summary disposition on the merits, reversing the November 20, 1992 opinion and order of the District Court of Appeal of Florida, Second District, in this case. (App. 1a).

OPINIONS BELOW

The Partial Summary Judgment in favor of petitioners issued by the Circuit Court of the Twelfth Judicial Circuit of Florida, dated August 23, 1989, is unreported and is reproduced in Appendix B (3a). The opinion and order of the District Court of Appeal of Florida, Second District, dated September 7, 1990 (referenced herein as "*Icard 1*"), is reported at 567 So.2d 937 and is reproduced in Appendix G (12a). The Order of the Supreme Court of Florida denying petitioners' Notice to Invoke Discretionary Jurisdiction, dated January 16, 1991, is reported at 576 So.2d 288 and is reproduced in Appendix C (5a). The Final Judgment of the Circuit Court of the Twelfth Judicial Circuit of Florida, dated July 25, 1991, is unreported and is reproduced in Appendix D (6a). The opinion and order of the District Court of Appeal of Florida, Second District, dated November 20, 1992 (referenced herein as "*Icard 2*"), is unreported and is reproduced in Appendix A (1a). The Order of the District Court of Appeal of Florida, Second District, denying petitioners' Motion for Rehearing or for Clarification, Motion for Rehearing En Banc and Motion for Certification as Passing Upon a Question of Great Public Importance and of Direct Conflict with Decisions of another District Court of Appeal and of the Supreme Court of Florida, dated January 28, 1993, is unreported and is reproduced in Appendix E (8a). The Order of the Supreme Court of Florida denying the petitioners' second Notice to Invoke Discretionary Jurisdiction is not, as yet, reported and is reproduced in Appendix F (10a).

JURISDICTION

The judgment or decree here sought to be reviewed is the opinion and order of the District Court of Appeal of Florida, Second District, entered on November 20, 1992 (App. 1a). The order of that Court denying petitioners' Motion for Rehearing, etc., was entered on January 28, 1993 (App. 8a). The order of the Florida Supreme Court denying discretionary review in this case was entered on March 15, 1993 (App. 10a). This Court has jurisdiction, pursuant to 28 U.S.C. § 1257(a) and Rule 10.1(c) of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis added).

Section 1. of the of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

The petitioners own two residences situated on 39 acres of otherwise unimproved, residentially zoned, bayfront real property located 5,500 to 6,000 feet northwest of the end of the major runway of the Sarasota-Bradenton airport, which ownership predates the existence of the airport. Commercial jet aircraft arriving and departing from the airport traverse the super-adjacent airspace directly over the petitioners' property hundreds of times per month. The minimum glide slope of approaching jet aircraft extends from 148 feet to 118 feet above ground level.

The airport is owned and operated by the Sarasota-Manatee Airport Authority (the "Authority"), which is empowered by Chapter 31263 of the Laws of Florida to:

> acquire, by gift, purchase or the exercise of eminent domain, any land or *rights in land* deemed necessary in connection with the improvement or operation of its "airport facilities." "Airport facilities" is defined, in part, as "all properties rights, *easements*, and franchises relating thereto." (emphasis added).

In 1984, the petitioners brought this inverse condemnation action, seeking a judicial determination that the constant jet aircraft overflights had ripened into the taking of an avigational easement through the property. In May, 1989, the petitioners moved for partial summary judgment on the limited issue of whether a taking had occurred, reserving for a subsequent determination the amount of the petitioners' damages, if any.

At the summary judgment hearing on August 8, 1989, the parties stipulated that they would not present argument as to whether the overflights had negatively affected the value of the property since there was a factual dispute as to that issue. Addressing the court with respect to the stipulation, petitioners' counsel stated as follows:

> The stipulation that we've entered into about market loss really crystallizes the disputed legal issue here.
>
> Namely, that the defend8ant contends that the plaintiff must prove substantial market loss to the effected [sic] property as an essential element to finding whether there's been a taking.
>
> The plaintiff's position is the issue of market loss is totally irrelevant as a matter of law to the issue of whether there's been a taking under the constitutions of Florida in [sic] the United States.

Petitioners' counsel then addressed the distinction recognized in the decisions of this Court between a regulatory taking and those involving a physical trespass or invasion, relying specifically upon the decision of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Counsel further argued that, under both the Florida and U.S. Constitutions, where the "government chooses to invade property, then by its physical intrusion alone, the law is that there will be a taking found." (Transcript of 8/8/89 hearing, at page 8).

Counsel for petitioners argued that this Court "disagreed very strongly with the New York Court of Appeals" in the *Loretto* case and quoted at length from this Court's opinion with respect to "whether a minor but permanent physical occupation" of an owner's property authorized by the government constitutes a taking of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution and that, quoting this Court, "we have long considered a physical intrusion by the government to be a property restriction of unusually serious character for purposes of the takings clause". (Transcript of 8/8/89 proceedings, at pages 10-11).

Petitioners' counsel then argued at length based on the opinions of this Court in *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. County of Allegheny*, 369 U.S. 84 (1962). Petitioners' counsel relied on *Causby* as establishing the "proposition that direct overflights are physical invasions,"

analogizing the flight path to "an elevated railway" which would be a taking if it were erected at the precise altitude where the planes were flying even if none of the supports of the hypothetical structure "rested on the land." (Transcript of 8/8/89 proceedings, at pages 14 and 15).

In his argument to the trial court on behalf of the Authority, respondent's counsel focused on the decisions of this Court as they pertain to the issue of whether constant jet overflights constitute a permanent physical invasion and whether physical invasion alone, without conclusive proof of resulting, negative market value impact, is sufficient to establish a taking under the Constitution of the United States. (Transcript of 8/8/89 proceedings, at pages 61-63).

Citing *Causby* and *Griggs*, the trial court subsequently ruled in favor of the petitioners on their Motion for Partial Summary Judgment, finding that, in order to establish a taking, "there is no need to concurrently establish legal damage to the property." Finding further that resolution of the taking issue is not an entitlement to damages, the Court found that the determination of a taking is the "first step in the resolution" of an inverse condemnation claim. Further finding the extent and character of the overflights and the resulting interference with the petitioners' property to be "uncontradicted", the Court ruled that a taking by the Authority had "occurred through inverse condemnation", but that "the extent of the easement taken, and the damages, if any, are not determined or resolved here" and would instead be "reserved for further proceedings". (App. 3a)

Rather than proceed to trial on the basis established by the trial court's rulings on the market damage requirement issue described above, the Authority appealed to the District Court of Appeal of Florida, Second District (*Icard I*). Although the parties presented extensive argument in their briefs to the Second District concerning the proper interpretation of this Court's opinions in *Causby* and *Griggs*, the Second District did not address *Causby* or *Griggs* in its opinion in *Icard I* (App. 12a). The court did, however, conclude that the evidence below concerning "the altitude of the flights, the frequency of the flights and the amount of interference with the appellees' enjoyment of the property . . .

was sufficient to support a taking, *provided that the Appellees can [also] prove substantial market value damage on remand."* (emphasis added). Although the Second District thus found the *record evidence* concerning the government's *physical invasion* of the property to be *otherwise* sufficient to establish a taking, that Court reversed the trial court's determination that the property owner need not also "concurrently establish legal damage to the property" in order to prove a taking.

This determination by the Florida Second District Court of Appeal concerning the market damage requirement issue with respect to a taking has been briefed and argued (based on the controlling decisions of this Court) in every subsequent proceeding in the Florida court system in this case from the trial court level to the intermediate, district court of appeal and the Supreme Court of Florida. The determination of the Florida courts with respect to this issue has ultimately proven to be determinative in this case.

Following the Florida Supreme Court's denial of discretionary review of the Second District's opinion in *Icard I* (App. 5a), this case was remanded back to the trial court on the market value issue only. Following a non-jury trial, the trial court issued its final judgment, stating:

> In prior proceedings this court held, and the appellate court agreed, that evidence submitted on behalf of the Plaintiffs was sufficient to support a taking of their property by the Defendant, *provided* the Plaintiffs could prove their property had suffered "substantial market value damage." *Sarasota-Manatee Airport Authority v. Icard*, et al., 567 So.2d 937 (Fla. 2d DCA 1990) (emphasis that of the Court; App. 6a).

While the trial court thus *again* found the evidence of physical invasion in the record *otherwise* sufficient to establish a taking, the Court also found expert testimony on the market value damage issue to be in conflict. On that basis, the trial court ruled that the petitioners failed to prove market value damage and, therefore, ruled in favor of the Authority (App. 6a).

Petitioners then initiated in the District Court of Appeal of Florida, Second District, the current appeal of this case. In addition to challenging the evidentiary basis of the trial court's determination on the market value issue[1/], petitioners also *again* argued below that the trial court erred in any event by applying the market value damage requirement established in *Icard 1* as a condition precedent to the establishment of a taking - contrary to the express and unequivocal prior rulings of this Court (Initial Brief of Appellant in *Icard 2*, at pages 35 to 41).

The Second District again ruled in favor of the Authority, citing its prior decision in *Fields v. Sarasota-Manatee Airport Authority*, 512 So.2d 961 (Fla. 2d DCA, 1987) *rev. den.*, 527 So.2d 584 (Fla. 1988). The Court's opinion in *Icard 1* (App. 12a) goes beyond its opinion in *Fields*, however, because the market damage requirement was imposed in *Icard 1*, notwithstanding the Court's express finding in *Icard 1* that the record proof of physical invasion was *otherwise* sufficient to establish a taking (a finding absent from the Second District's prior opinion in *Fields*).

The Second District issued its opinion and order on November 20, 1992 (App. 1a) and issued its order denying the petitioners' timely motion for rehearing, etc., on January 28, 1993 (App. 8a). The Supreme Court of Florida subsequently denied petitioners' timely notice to invoke the discretionary jurisdiction of that Court, on March 15, 1993 (App. 10a).

[1/] The petitioners contended that undisputed or admitted evidence below demonstrated substantial, negative market value effect (including government zoning of the property as noise sensitive and requirements of extra expense in order to build on the property, the latter resulting in admitted, direct market value diminution).

Petitioners further contended that the purported conflict in expert evidence was actually based on an incorrect legal premise (i.e., that so long as real estate inflation outstrips the negative effect of the overflights, there is no taking, even if, as here, the property would be worth twice as much without the invasion - thus treating a gradually increasing physical invasion different from the same invasion upon the opening of a new airport.

REASONS FOR GRANTING SUMMARY DISPOSITION OF REVERSAL

The respondent argued below that, because the invasions are intermittent, they at most create at *temporary* rather than a *permanent* taking. This court addressed the issue in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which involved an easement through private property to provide public beach access. There, this Court stated:

> "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use'. . . is to use words in a manner that deprives them of all their ordinary meaning."
>
> . . .
>
> We think a 'permanent physical occupation' has occurred, for purposes of [the *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U. S. at 830, 832.

The rule is no different when the physical invasion is *over* the property. The leading case with respect to aircraft overflights is *United States v. Causby*, *supra*, which is cited in *Loretto*, *supra*, as an example of permanent physical invasion. *Causby* holds that direct overflights are physical invasions that are takings *even if the use of the property below is not destroyed*. *Id.* at 262. *Causby* held that flights below navigable airspace (500 to 1,000 feet) are an impermissible infringement on private property. *Id.* at 265.

> The fact that (the landowner) does not occupy it (his overhead airspace) in a physical sense - by the erection of buildings and the like - is not material. As we have said, the flight of airplanes, which

> skim the surface but do not touch it, is as much of an appropriation of the use of the land as a more conventional entry upon it . . . .
>
> The super-adjacent airspace at this low altitude is so close to the land that continuous invasion of it affect the sue of the surface of the land itself. We think the landowner, as an incident to his ownership, has a claim to it and that invasion of it are in the same category as invasion of the surface. *Causby*, 328 U.S. at 264, 265.

This Court then set out the elements for the cause of action of the *de facto* taking of an avigation easement in a direct overflight case:

1. Direct overflights of private land.
2. At low altitude.
3. With frequency.
4. Causing a direct and immediate interference with the enjoyment and use of the land.

Market Loss was not, in itself, segregated as an element to this cause of action.

After *Causby*, Congress redefined "navigable airspace" to include the glide slope for safe approach and departure paths. These glide slopes were necessarily *below* the minimum permissible altitudes established by *Causby* as the taking threshold (500 feet over rural areas and 1,000 feet over urban).

Then, in *Griggs v. County of Allegheny*, 369 U.S. 84 (1962), this Court held that even if overflights were in redefined "navigable airspace," as in the approach areas, such would amount to a compensable taking for which the airport operator would be liable.

The *Griggs* property was within 3,250 feet from the runway, in the approved "approach areas" of the airport's master plan. The 40:1 safe glide slope meant that for every 40 feet of horizontal distance of the ground, the aircraft would rise 1 foot

vertically. Thus, at 3,250 feet from the runway, the bottom of the minimum safe approach area was 81 feet (3, 250 divided by 40). There was a clear and direct interference with the use of the property below. See *Griggs*. The types of interference noted in *Griggs* (vibrations, communications, sleeping) are the same as found uncontradicted in the instant case of the Icard family. In *Griggs*, there is, again, no inclusion of market loss as an essential element of the cause of action.

Accordingly, a requirement of proof of "market loss" in a case involving direct physical invasion of airspace is a clear violation of *Loretto* and an unsupported adjunct to the *Causby* and *Griggs* decisions.

Last year, this Court issued a further decision expressly and specifically reaffirming its prior determinations that, in physical invasion cases (including, specifically, airport overflight cases) no inquiry into market value damage is appropriate. In *Lucas v. South Carolina Coastal Council*, ____ U.S. ____, 112 S.Ct. 2886, 2893 (1992), this Court stated:

> "We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. [Citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 u.s. 419 (1982); other citations omitted] . . . See also *United States v. Causby*, 328 U.S. 256, 265 and n. 10 (1946) (*physical invasions of airspace*) (emphasis added).

Thus, as recently as June, 1992, this Court has reaffirmed its earlier findings that an airport overflight case, such as *Causby*, is, indeed, an example of a permanent, physical "invasion", so as

to establish a compensable taking, "**no matter how minute the intrusion** . . ."

It is thus apparent that the burden of proof to establish a taking of an avigational easement in Florida directly conflicts with the prior decisions of this Court. Because the issue of burden of proof in an inverse condemnation case is so substantially intertwined with the Constitutional right of an owner to the quiet use and enjoyment of his property, the issue clearly presents a question of great public importance justifying consideration and requiring resolution by this Court.

By their rulings below in this case, the Courts of Florida have rendered dispositive the ruling of law announced by the District Court of Appeal of Florida, Second District, in *Icard I* that, even in cases involving direct, physical invasion of private property, there is a legal necessity to *also* prove a reduction in the market value of the property in order to establish a "taking" within the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States. As demonstrated above, this determination of law conflicts with applicable decisions of this Court on the issue. A summary reversal is thus required in order to preserve equal protection of the laws of the United States to the owners of private property in the State of Florida.

In a larger sense, it should also be noted that Florida is a state in which laws pertaining to land use issues, as well as the regulation and protection of private property interests, are of particular significance because of the State's fragile, natural environment and resulting heavy regulatory environment. Because of that circumstance and the fact that Florida is currently the fourth most populous state in the country, this erroneous judicial interpretation of federal Constitutional requirements as they pertain to private property interests should not be permitted to stand and potentially influence and confuse the law in other jurisdictions.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted and this Court should issue an order of summary disposition on the merits, reversing the November 20, 1992 judgment of the District Court of Appeal of Florida, Second District, in this case.

Respectfully submitted,

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Attorneys for Petitioners

April 28, 1993

APPENDICES

APPENDIX A

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

No. 91-03679

THOMAS F. ICARD, JR., as Trustee, and FAYE ICARD HUSKINS, as Trustee-designate,

Appellants,

V.

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic corporate,

Appellee.

Opinion filed November 20, 1992.

Appeal from the Circuit Court
for Manatee County;
Steven L. Dakan, Judge.

Stanley W. Moore and Alan E.
DeSerio of Brigham, Moore,
Gaylord, Wilson, Ulmer,
Schuster and Sachs, Tampa,
and Peter J. Winders of Carlton, Fields, Ward,
Emmanuel, Smith &
Cutler, P.A., Tampa,
for Appellants.

A. Lamar Matthews, Jr., Steven
D. Hutton and Martin Garcia
of Matthews, Hutton &

Eastmore, Sarasota,
for Appellee

PER CURIAM.

Affirmed. *See Fields v. Sarasota-Manatee Airport Authority*, 512 So.2d 961 (Fla. 2d DCA 1987), *rev. den.*, 520 So.2d 584 (Fla. 1988).

LEHAN, C.J., and SCHOONOVER and FRANK, JJ., Concur.

APPENDIX B

CIRCUIT COURT IN AND FOR
MANATEE COUNTY, FLORIDA

No. CA-84-2630

THOMAS F. ICARD, as Trustee, J. PAUL ICARD, as Trustee, THOMAS F. ICARD, as Trustee, THOMAS F. ICARD, and GENE S. ICARD,

Plaintiffs,

V.

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Defendant.

PARTIAL SUMMARY JUDGMENT

After hearing on Motion for Partial Summary Judgment, and after review of evidence and arguments of counsel, the Court finds:

1. In claims of airport inverse condemnation; a taking occurs when the jet and plane traffic is frequent, low, a substantial and continuing interference with the owner's use and enjoyment of the property, and directly overhead. *Fields v. Sarasota-Manatee Airport Authority*, 512 So.2d 961 (Fla. 2d DCA 1987), *United States v. Causby*, 328 U.S. 256, (1945), *Griggs v. County of Allegheny*, 369 U.S. 84, (1962).

2. To establish a taking for purposes of this Partial Summary Judgment there is no need to concurrently establish legal damage to the property. The resolution of the taking issue is not an entitlement to damages. Rather, it is the first step in the resolution of the entire claims for inverse condemnation. No cases presented by either side are on point and one appear to infer that the existence of damage is an essential element establishing a taking.

3. There is uncontradicted evidence that flights over Plaintiff's home were frequent, continuing, and a substantial interference with Plaintiff's property (Mrs. Icard's Answers to Interrogatories #17-25). There is uncontradicted evidence that the flights were directly overhead and low. The lowest level of the permitted flight path over the Plaintiff's home was well under 500 feet. From the interrogatories submitted by Plaintiff they were low enough to substantially and continually interfere with normal conversations and the customary use and enjoyment of the home hundreds of times per month.

Therefore, it is ORDERED AND ADJUDGED:

Partial Summary Judgment is GRANTED in favor of the Plaintiff such that a taking by Defendant has occurred through inverse condemnation. The extent of the easement taken and the damages, if any, are not determined or resolved here. Those issues are reserved for further proceedings.

DONE AND ORDERED this 23rd day of August, 1989, in Chambers, Manatee County Courthouse, Bradenton, Florida.

_____

SCOTT M. BROWNELL, CIRCUIT JUDGE

COPIES TO:
S. W. Moore, Esquire
Steven D. Hutton, Esquire

APPENDIX C

576 SOUTHERN REPORTER, 2d SERIES

SUPREME COURT - CONTINUED

Title	Docket Number	*Date	Disposition	**Appeal from and Citation
Icard v. Sarasota-Manatee Airport Authority...	76751	1/16/91	Rev. den.	2d DCA 567 So.2d 937

APPENDIX D

CIRCUIT COURT IN AND FOR
MANATEE COUNTY, FLORIDA

No. CA-84-2630

THOMAS F. ICARD, JR. and J. PAUL ICARD, as Trustees, et al.,
Plaintiffs,

V.

SARASOTA-MANATEE AIRPORT AUTHORITY, etc.,
Defendant.

FINAL JUDGMENT

In prior proceedings this court held, and the appellate court agreed, that evidence submitted on behalf of the Plaintiffs was sufficient to support a taking of their property by the Defendant, *provided* the Plaintiffs could prove their property had suffered "substantial market value damage." *Sarasota-Manatee Airport Authority v. Icard, et al.*, 567 So.2d 937 (Fla. 2d DCA 1990). A subsequent non-jury trial was held in which both parties presented evidence to support their respective positions.

Substantial evidence was presented by both sides, but, as is usually the case in eminent domain proceedings, the case boiled down to a "battle of the experts"--in this case each side's appraisers. Both appraisers had--at least at first glance--equally compelling reasons to support their positions. In the last analysis, however, the Court must find that the Plaintiffs have

failed to prove by the greater weight of the evidence that their property has suffered substantial market value damage to support a claim of inverse condemnation. It is, therefore,

ADJUDGED as follows:

1. The claim of the Plaintiffs for Inverse Condemnation is denied and dismissed, and the defendants shall go hence without day.

2. The court reserves jurisdiction to tax costs, if any.

DONE AND ORDERED in Chambers in Sarasota County, Florida, this 25th day of July, 1991.

_____

STEPHEN L. DAKAN, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Judgment was furnished by U.S. Mail to S. W. Moore, Esq., 100 Wallace Avenue, Sarasota, FL 34237, A. Lamar Matthews, Jr., Esq., P.O. Box 3258, this ____ day of July, 1991.

_____

Judicial Assistant

APPENDIX E

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

January 28, 1993

No. 91-03679

THOMAS F. ICARD, JR., and FAYE ICARD HUSKINS,

Appellant(s),

V.

SARASOTA-MANATEE AIRPORT AUTHORITY, etc.,

Appellee(s).

BY ORDER OF THE COURT:

Counsel for appellants having filed a motion for rehearing or for clarification; motion for rehearing en banc and motion for certification as passing upon a question of great public importance in the above-styled case, upon consideration, it is

ORDERED that the motions are hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: Alan E. DeSerio, Esq.
Carlton, Fields, Ward,
A. Lamar Matthews, Jr., Esq.

EXHIBIT F

SUPREME COURT OF FLORIDA
MONDAY, MARCH 15, 1993

No. 81,366

THOMAS F. ICARD, JR., ETC., ET AL.,

Petitioners,

V.

SARASOTA-MANATEE AIRPORT AUTHORITY, ETC.,

Respondent.

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980).

No motion for rehearing will be entertained by the Court.

A True Copy

Clerk
TEST:

H
cc: Hon. William A. Haddad,

Hon. Richard B. Shore, III,
Clerk
Hon. Steven L. Dakan, Judge

Peter J. Winders, Esquire
A. Lamar Matthews, Jr.,

Sid J. White
Esquire
Clerk Supreme Court

Brigham, Moore, Gaylord,

Wilson, Ulmer, Schuster &
Sachs, P.S.

By: _____
Deputy Clerk

APPENDIX G

576 SOUTHERN REPORTER, 2d SERIES

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT.

No. 89-03005

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Appellant,

V.

THOMAS F. ICARD, JR. and PAUL ICARD, as Trustees; THOMAS F. ICARD, JR., and GENE S. ICARD, as Personal Representatives of the Estate of Thomas F. Icard, Deceased; and GENE S. ICARD,

Appellees.

Sept.7, 1990

Rehearing Denied Oct. 10, 1990.

Inverse condemnation action was brought by residential property owners against airport authority. The Circuit Court, Manatee County, Scott M. Brownell, J., entered partial summary judgment finding that a taking had occurred, and airport authority appealed. The District Court of Appeal, Patterson, J., held that: (1) taking could not be found absent proof of substantial loss in market value, but (2) evidence of altitude and frequency of flights and amount of interference with

enjoyment of the property was sufficient to support a taking, provided that owners could prove substantial market value damage.

Affirmed in part, reversed in part, and remanded.

1. **Eminent Domain**

A taking by airport authority of residential property by reason of aircraft overflights could not be found, and owners were not entitled to inverse condemnation relief, in absence of proof of substantial loss in market value.

2. **Eminent Domain**

Evidence of altitude of aircraft flights over residential property just over a mile from the end of major airport runway, frequency of flights, and amount of interference with enjoyment of the property was sufficient to support a taking, provided that the owners could prove substantial market value damage.

A. Lamar Matthews, Jr., Steven D. Hutton and Martin Garcia of Williams, Parker, Harrison, Dietz & Getzen, Sarasota, for appellant.

S. W. Moore and Alan E. DeSerio of Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster & Sachs, Sarasota, and Alan C. Sundberg and Thomas F. Icard, Jr., of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for Appellees.

PATTERSON, Judge.

Appellant Sarasota-Manatee Airport Authority (the Authority), defendant below, challenges a partial summary judgment entered in favor of the appellees, plaintiffs below, which finds that a taking has occurred through inverse condemnation and leaves the issues of the extent of the avigational easement and damages, if any, for further proceedings. We have jurisdiction pursuant to Florida Rule of

Appellate Procedure 9.130(a)(3)(C)(iv). The Authority argues that the trial judge erred in finding a taking and not requiring proof of a loss in the property's market value. We agree and reverse.

The appellees own thirty-nine acres of property which lie approximately 5,500 to 6,000 feet northwest of the end of the major runway of the Sarasota-Bradenton Airport. Jet aircraft fly directly over the appellees' property. The minimum glide slope of approaching jet aircraft extends from 148 feet to 188 feet above ground level over the appellees' land.

In 1984 the appellees brought this inverse condemnation action and requested an order of taking compelling the Authority to institute eminent domain proceedings. The appellees claimed that jet airplane overflights have occurred at such altitudes and with such frequency as to have ripened into the taking of an avigational easement over the property. The appellees also alleged that they have been substantially deprived of the residential use of their property due to vibrations, fear, anxiety, fumes, residue, noise, disruption of conversation, and interruption of sleep. The appellees claimed that the aircraft overflights have destroyed the residential character of their property resulting in a marked, substantial decrease in its market value.

[1] The appellees moved for summary judgment on the issue of the Authority's liability for a taking of avigational easements over the appellees' property. At the summary judgment hearing, the parties stipulated that they would not argue the existence of substantial market value impact on the property since there was a factual dispute over whether the property had suffered any market loss. The trial judge granted the appellees' motion for summary judgment on the issue of a taking, but reserved ruling on the extent of the easement taken and the amount of damages. The trial judge found that the appellees need not "concurrently establish legal damage to the property" to prove a taking.

This court's decision in *Fields v. Sarasota-Manatee Airport Authority*, 512 So.2d 961 (Fla. 2d DCA 1987), *rev.*

denied,520 So.2d 5894 (Fla. 1988), supports the Authority's position and dictates a reversal. As in the present case, *Fields* dealt with direct overflights of aircraft, and the plaintiffs sought relief on the theory of the continuing physical invasion of the property due to the direct overflights. The *Fields* court held that because the plaintiffs did not prove a substantial loss in market value, they were not entitled to inverse condemnation relief. "Under the Florida Constitution and Florida case law, a 'decreased increase' of one percent in the value of the landowner's property is not a continuing invasion of property, nor ouster or deprivation of all beneficial use of a landowner's property and does not entitle the landowner to compensation for inverse condemnation." *Fields*, 512 So.2d at 965.

Thus, in the present case the factual dispute over market value damage precludes a grant of partial summary judgment on whether a taking has occurred. The partial summary judgment is reversed and the case remanded to determine whether there was substantial market value damage to constitute a taking, which would then require the Authority to institute eminent domain proceedings.

[2] The Authority also contends that the appellees failed to present sufficient evidence of the altitude of the flights, the frequency of the flights and the amount of interference with the appellees' enjoyment of the property. We hold that the evidence was sufficient to support a taking, provided that the appellees can prove substantial market value damage on remand.

We do not reach the Authority's last point on appeal, because our reversal of the partial summary judgment renders the point moot.

Affirmed in part, reversed in part and remanded.

HALL, A.C.J., and PARKER, J., concur.